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82-656

Case No. ____

IN THE
# Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS P. POMEROY, *Petitioner*,

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY AND JOEL D. WARE, *Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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October 14, 1982

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

## QUESTION PRESENTED

Is an "opinion" which implies the allegation of undisclosed defamatory facts as its basis absolutely privileged under the first amendment, as the courts below held?

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IN THE

# Supreme Court of the United States

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Case No. ___

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THOMAS P. POMEROY, *Petitioner*,

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SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY AND JOEL D. WARE, *Respondents*.

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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### OPINION BELOW

The opinion below is reported: *Pomeroy* v. *Southern Bell Tel. & Tel. Co.*, 410 So.2d 647 (Fla. 3d DCA 1982), *petition for review denied*, ___ So.2d ___ (Fla. 1982).

### JURISDICTION

The Florida Third District Court of Appeal entered its decision on March 9, 1982. The Florida Supreme Court denied the petition for discretionary review, without opinion (and with one dissent), on July 16, 1982.

This Petition for Writ of Certiorari is filed pursuant to 28 U.S.C. § 1257(3).

### CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## STATEMENT OF THE CASE

Thomas P. Pomeroy sued Southern Bell Telephone and Telegraph Company and Joel D. Ware (collectively referred to as "Southern Bell") for libel and slander. Southern Bell moved to dismiss on several grounds, including the First Amendment. The trial court dismissed Pomeroy's initial and only complaint, with prejudice, and without leave to amend.

The Third District Court of Appeal affirmed, and the Florida Supreme Court denied discretionary review without opinion.

Irked by adverse recommendations by a Dade County, Florida evaluation team (headed by Pomeroy) on telephone service for the County, Southern Bell Vice President Joel D. Ware wrote to Pomeroy's superior (with copies to Southern Bell and County officials) and charged that Pomeroy had somehow spoiled the objectivity of the bidding process. The letter stated:

> Dear Roger:
>
> I have previously expressed to you that the evaluations by the County Communications Evaluation Committee are being grossly biased against Southern Bell by Tom Pomeroy. I have personally reviewed the details of some of these evaluations and formed this opinion.
>
> I was shocked today to find an additional impact his evaluations are having on Southern Bell. The attached *County* evaluation sheet was attached to a proposal on a competitive case with one of our business customers.

> Roger, I don't believe that you condone this practice of allowing Southern Bell management to be put in embarrassing situations as a result of apparent unobjectivity on the part of staff.

/s/ Joel

Florida's Third District Court of Appeal affirmed the dismissal of Pomeroy's complaint in a brief opinion:

> In our view, the allegedly defamatory statements sued upon were no more than expressions of opinion and were therefore properly determined to be nonactionable as a matter of law. *From* v. *Tallahassee Democrat, Inc.*, 400 So.2d 52 (Fla. 1st DCA 1981); *Palm Beach Newspapers, Inc.* v. *Early*, 334 So.2d 50 (Fla. 4th DCA 1976), *appeal dismissed, cert. denied*, 354 So.2d 351 (Fla. 1977), *cert. denied*, 439 U.S. 910 (1978).

Pomeroy timely petitioned the Florida Supreme Court for discretionary review under Article V, § 3(b), Florida Constitution (1980), and that Court, in a 4-to-1 decision without opinion, denied review.

## REASONS FOR ALLOWING THE WRIT

The Florida courts have misconstrued this Court's decisions and have improperly used the First Amendment as a shield for any defamatory statement that the author may cloak under the guise of an opinion.

As this Court has stated, "there is no constitutional value in false statements of fact." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). The Florida courts, however, have taken the decision in *Gertz* to require a blanket immunity based on what the courts have misperceived as an absolute distinction between "opinion" and fact.

Florida's departure from this Court's precedents began with the decision in *Palm Beach Newspapers, Inc.* v.

*Early*, 334 So.2d 50 (Fla. 4th DCA 1976), *appeal dismissed, cert. denied*, 354 So.2d 351 (Fla. 1977), *cert. denied*, 439 U.S. 910 (1978). In *Brown Transport Corp.* v. *Atcon, Inc.*, 439 U.S. 1014, 1022 (1978), Justice White (joined by Justice Blackmun, dissenting from a denial of certiorari), listed *Early* among the decisions passed over by this Court which nevertheless presented "important questions of federal law not heretofore determined by this Court."

In *Early*, a school superintendent sued for libel based on a series of newspaper articles and editorials critical of his performance in office:

> Plaintiff/appellee complained that the defendants characterized his tenure in office as *unsuccessful*, and stated that he was unfit to hold the office of Superintendent of Public Instruction because of his *ineptness*, *incompetence*, and *indecisiveness*.

334 So.2d at 52 (emphasis in original). The court concluded that those statements were pure opinion and therefore not actionable:

> [*Gertz* v. *Robert Welch*] made clear that the defamatory falsehood referred to in the *New York Times [Company* v. *Sullivan*, 376 U.S. 254 (1964)] standard refers to a statement of fact as opposed to pure comment or opinion:
>
> > We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correctness not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.
>
> It thus appears that under the present state of the law concerning an action for libel by a public official, the plaintiff has the burden of showing by clear and

> convincing evidence that the defamatory statement was (1) a statement of fact, (2) which was false, and (3) made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

334 So.2d at 52.

Florida's other courts of appeal have followed *Early* and its simplistic fact/opinion dichotomy. *See Lampkin-Asam* v. *Miami Daily News, Inc.*, 408 So.2d 666, 667 n.1 (Fla. 3d DCA 1982), *petition for review denied*, 417 So.2d 329 (Fla. 1982), *cert. denied*, ___ S.Ct. ___ (1982) (opinion held "entitled to absolute constitutional protection," citing *Early* and *Gertz*); *From* v. *Tallahassee Democrat, Inc.*, 400 So.2d 52, 57 (Fla. 1st DCA 1981), *pet. for review denied*, 412 So.2d 465 (Fla. 1982) ("*Gertz* would indicate that expressions of opinion are privileged and protected by the Constitution."); *Coleman* v. *Collins*, 384 So.2d 229, 231 (Fla. 5th DCA 1980).

Petitioner respectfully submits that the Florida courts have emasculated common law defamation in their mistaken homage to the First Amendment. In *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 292 n.30 (1964), this Court stated that the fundamental importance of the free exchange of ideas requires that "a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact."

This language, and the Court's recognition in *Gertz* that "there is no such thing as a false idea," do not require the states to balance the important competing interests represented by the First Amendment and defamation law on so flimsy a fulcrum as a distinction between fact and opinion.

The Restatement (Second) of Torts § 566 (1977) properly recognizes that the line is not so easily drawn as presumed by the Florida decisions:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

As explained in comment (c) to the Restatement:

> A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently. The difference lies in the effect upon the recipient of the communication. In the first case, the communication itself indicates to him that there is no defamatory factual statement. In the second, it does not, and if the recipient draws the reasonable conclusion that the derogatory opinion expressed in the comment must have been based on undisclosed defamatory facts, the defendant is subject to liability.

Here, Southern Bell charged that Pomeroy was "biasing" what was supposed to be an objective bid evaluation procedure—that Pomeroy was taking affirmative acts to spoil the objectivity of the process. An opinion such as this, which implies as its basis undisclosed defamatory facts, is not protected by the First Amendment. "[T]here is no constitutional value in false statements of fact." *Gertz*, 418 U.S. at 340.

Pomeroy submits that the Florida courts have overextended the First Amendment and denied Pomeroy his right to redress for the ruination of his career by South-

ern Bell's defamation. Nothing in the First Amendment requires such a result.

## CONCLUSION

For these reasons, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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October 14, 1982

IN THE CIRCUIT COURT OF THE 11th
JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

**CASE No. 80-4999 (02)**

THOMAS P. POMEROY, individually

*Plaintiff,*

v.

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, a foreign corporation, and JOEL D. WARE,

*Defendants.*

**COMPLAINT FOR COMPENSATORY AND PUNITIVE DAMAGES FOR INTENTIONAL, TORTIOUS ACTIONS BY UTILITY DESIGNED AND CALCULATED TO MAINTAIN *DE FACTO* MONOPOLY OF GOVERNMENTAL TELEPHONE SUPPLY BY INTIMIDATING, COERCING AND DEFAMING GOVERNMENT EMPLOYEE IN HIS ATTEMPT TO PERFORM HIS DUTIES IN FURTHERANCE OF THE PUBLIC GOOD AND FOR INVASION OF PRIVACY AND TORTIOUS INTRUSION INTO PLAINTIFF'S EMPLOYMENT RELATIONSHIP.**

PLAINTIFF, Thomas P. Pomeroy, sues Defendants, Southern Bell Telephone & Telegraph Company ("Southern Bell"), a foreign corporation, and Joel D. Ware, jointly and severally, and alleges:

1. This is an action for damages exceeding $10,000, exclusive of interest and costs.

2. Thomas Pomeroy is *Sui Juris*, and is a citizen and resident of Miami, Dade County, Florida.

3. Southern Bell is a foreign corporation registered to do business in Florida, with offices located at 666 Northwest 79th Avenue, Miami, Dade County, Florida.

4. Joel D. Ware is *sui juris*, and is a citizen and resident of Dade County, Florida.

5. Since 1976, Pomeroy has been employed by the General Services Administration, Telecommunications Division, of Metropolitan Dade County, Florida, where he is a supervisor in charge of 44 employees.

6. In the period September 19, 1976, through the present, as Supervisor for the Telecommunications Division, Pomeroy, with, by and through his staff, evaluated all bids for three Dade County projects, known as the Regional Data Processing and Communications Center, the 911 Automatic Call Distributor, and the Public Defender's Office Switching System. For all three projects, Southern Bell's bids were neither the lowest nor the most completely compliant with Dade County requirements. For these and other good and valid reasons, Southern Bell's bids were not accepted by the County.

7. In 1979, displeased with Pomeroy's evaluations, concerned that its long-term *de facto* monopoly of Dade County telephone equipment might be endangered, and wrongfully intending to intimidate Pomeroy's superiors so that they would feel constrained to doubt or disregard future Pomeroy recommendations, Southern Bell commenced to undermine his position with his superiors. Both orally and in writing, Southern Bell Vice President Joel D. Ware, individually and as an agent and servant of Southern Bell, acting within the course and scope of his employment and authority, falsely and repeatedly accused Pomeroy of being "grossly biased" against Southern Bell.

8. On April 12, 1979, by letter sent to Roger Carlton, Executive Assistant to Dade County Manager Merritt Steirheim (copied to Steirheim himself and to Steirheim's other Executive Assistant, William Talbert, and also copied to the then Southern Bell President, J.M. Brown), Ware falsely stated that the evaluations of the County Communications Evaluations Committee were "being grossly biased against Southern Bell by Tom Pomeroy."

9. Ware further stated to Carlton that, "I don't believe you condone this practice of allowing Southern Bell manage-

ment to be put in embarrassing situations as a result of apparent unobjectivity on the part of staff."

10. A copy of Ware's April 12, 1979 letter is annexed and made a part of this pleading as Exhibit A.

## COUNT I

## CLAIM FOR LIBEL AGAINST SOUTHERN BELL

11. Plaintiff realleges paragraphs 1 through 10, inclusive.

12. Southern Bell deliberately and maliciously published false and defamatory written statements about Pomeroy. These statements are libelous *per se*, in that they relate to matters incompatible with Pomeroy's trade, professional, and business relations and obviously tending to subject him to distrust, disgrace, and obloquy.

13. Southern Bell made the above statements with knowledge that they were false and/or with reckless disregard for whether they were false, with the purpose and intention of destroying Pomeroy's reputation and his effectiveness as a public servant.

14. As a result of Southern Bell's false and malicious statements, Pomeroy suffered damages for injury to reputation, mental suffering, and other damages.

15. Southern Bell is therefore liable to Pomeroy for nominal damages, general damages, compensatory damages, prejudgment interest, attorney's fees and costs.

16. Since, among other things, it was intent upon preserving, extending and maintaining its improper *de facto* monopoly of County telephone equipment supply through intimidation of public officials, Southern Bell's actions were undertaken recklessly, willfully, wantonly, maliciously and/or with gross disregard for Pomeroy's rights.

17. Such actions, permitted without rebuke, would encourage others to engage in similarly reprehensible misconduct;

government simply cannot perform its duties where there are wrongful and improper intrusions into its processes, and government employees and officials are badgered, bullied, muscled and initmidated by false and personal attacks upon their competence and integrity.

18. Southern Bell is therefore also liable to Pomeroy for punitive damages in such amounts as bear a reasonable and functional relation to Southern Bell's own financial resources but, in any event, in excess of $1,000,000.

## COUNT II

## CLAIM FOR SLANDER AGAINST SOUTHERN BELL

19. Plaintiff realleges paragraphs 1 through 13, inclusive.

20. Southern Bell deliberately, maliciously and repeatedly uttered false and defamatory statements about Pomeroy relating to matters incompatiable with Pomeroy's trade, professional, and business relations, and obviously tending to subject him to distrust, disgrace, and obloquy.

21. The exact content of these statements is not yet known to Pomeroy, but their general, defamatory content and intent are described by Ware himself in Exhibit A.

22. Southern Bell made these statements with knowledge that they were false and/or with reckless disregard for whether they were false, for the purpose of destroying Pomeroy's reputation and effectiveness as a public servant.

23. Plaintiff realleges paragraphs 14 through 18, inclusive.

## COUNT III

## CLAIM FOR LIBEL AGAINST WARE

24. Plaintiff realleges paragraphs 1 through 14, inclusive.

25. Ware deliberately and maliciously published false and defamatory written statements about Pomeroy. These statements are libelous *per se*, in that they relate to matters incompatible with Pomeroy's trade, professional, and business

relations, and obviously tending to subject him to distrust, disgrace, and obloquy.

26. Ware made the above statements with knowledge that they were false and/or with reckless disregard for whether they were false, for the purpose of destroying Pomeroy's reputation and his effectiveness as a public servant.

27. Plaintiff realleges paragraphs 15 through 18, inclusive.

## COUNT IV

## CLAIM FOR SLANDER AGAINST WARE

28. Plaintiff realleges paragraphs 1 through 13, inclusive.

29. Ware deliberately, maliciously and repeatedly uttered false and defamatory statements about Pomeroy relating to matters incompatible with Pomeroy's trade, professional, and business relations, and obviously tending to subject him to distrust, disgrace, and obloquy.

30. The exact content of these statements is not yet known to Pomeroy, but their general content and intent are described by Ware himself in Exhibit A.

31. Ware made these statements with knowledge that they were false and/or with reckless disregard for whether they were false, for the purpose of destroying Pomeroy's reputation and effectiveness as a public servant.

32. Plaintiff realleges paragraphs 15 though 18, inclusive.

## COUNT V

## CLAIM AGAINST SOUTHERN BELL FOR DURESS AND COERCION TO PREVENT A GOVERNMENT EMPLOYEE FROM PERFORMING HIS DUTIES

33. Plaintiff realleges paragraphs 1 through 13, inclusive.

34. The foregoing acts constitute unlawful and improper duress and coercion, perpetrated for the purpose of maintaining, extending and strengthening Southern Bell's *de facto*

monopoly over governmental telephone supply by unlawfully preventing, impeding and hindering a government employee from performing his duties in furtherance of the public good.

35. Plaintiff realleges paragraphs 15 through 18, inclusive.

**COUNT VI**

**CLAIM AGAINST WARE FOR DURESS AND COERCION TO PREVENT A GOVERNMENT EMPLOYEE FROM PERFORMING HIS DUTIES**

36. Plaintiff realleges paragraphs 1 through 13, inclusive.

37. The foregoing acts constitute unlawful and improper duress and coercion, perpetrated for the purpose of maintaining, extending and strengthening Southern Bell's *de facto* monopoly over governmental telephone supply by unlawfully preventing, impeding and hindering a government employee from performing his duties in furtherance of the public good.

38. Plaintiff realleges paragraphs 15 through 18, inclusive.

**COUNT VII**

**CLAIM AGAINST SOUTHERN BELL FOR UNLAWFUL RESTRAINT OF TRADE AND FOR MONOPOLIZATION FOR INTENTIONALLY ATTACKING AND THREATENING GOVERNMENT EMPLOYEE WITH THE PURPOSE OF COERCING AND INTIMIDATING EMPLOYEE'S SUPERIORS AND THEREBY MAINTAINING, PROMOTING, AND EXTENDING IMPROPER MONOPOLY AT GOVERNMENT TELEPHONE SUPPLY**

39. Plaintiff realleges paragraphs 1 through 13, inclusive.

40. Alternatively or cumulatively, the foregoing attacks upon Pomeroy were part of an ongoing effort to preserve, protect, and defend Southern Bell's *de facto* monopoly by the chilling and intimidating effect that attack would have upon Pomeroy's superiors up to and including the County Manager.

41. Southern Bell's ongoing political lobbying and pressure with reference to Dade County's elected Commissioners, com-

bined with the threat to attack staff personally, would enable Southern Bell to prevent the encroachment of its smaller but much less expensive competitors into the public arena.

42. Exclusion of those competitors has enriched Southern Bell and depleted the public treasury by more than $20,000,000 in the years preceding 1979.

43. For these and other improper reasons, Southern Bell apparently considered Pomeroy an expendable pawn to be sacrificed to protect its improper monopoly.

44. Whatever other privilege Southern Bell had, or may have had, to engage even in otherwise lawful business activities was vitiated by the quality of these acts, in that they were actually malicious, willful, wanton and/or undertaken with gross disregard for Pomeroy's rights.

45. Plaintiff realleges paragraphs 15 through 18, inclusive.

**COUNT VIII**

**CLAIM FOR UNREASONABLE RESTRAINT OF TRADE**

46. Plaintiff realleges paragraphs 1 through 13, inclusive.

47. Such actions also violated Florida Statutes, Chapter 542, and under the rule of *So. Fla. R. Co.* v. *Rhoads*, 5 So. 633, 635 (Fla. 1889), and *Hardrives Co.* v. *E. Coast Asphalt Corp.* 166 So. 2d 810 (Fla. 2d DCA 1964) are actionable.

48. Plaintiff realleges paragraphs 43, and 15 through 18, inclusive.

**COUNT IX**

**CLAIM FOR INVASION OF PRIVACY AND OF THE RIGHT TO BE SECURE IN HIS EMPLOYMENT FROM IMPROPER AND OPPRESSIVE INTRUSION.**

49. Plaintiff realleges paragraphs 1 through 13, inclusive.

50. The foregoing acts also constitute tortious, wrongful invasion of Pomeroy's privacy and of his right to be secure in

his employment from unwarranted, improper and oppressive intrusion.

51. Plaintiff realleges paragraphs 15 through 18, inclusive.

WHEREFORE, Thomas P. Pomeroy sues Southern Bell Telephone & Telegraph Company and Joel D. Ware, jointly and severally, for nominal, general and compensatory damages in excess of $10,000 exclusive of interest and costs, for prejudgment interest, for attorney's fees and costs, and for punitive damages in excess of $1,000,000.

Dated this 18th day of March, 1980.

BAILEY & DAWES,
a professional association
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(305) 374-5505

/s/ Guy B. Bailey

and

/s/ Sara Soto

J. D. WARE
666 N.W. 79TH AVENUE
MIAMI, FLORIDA 33126

April 12, 1979

EXHIBIT A

PRIVATE

Mr. Roger Carlton
Executive Assistant
County Manager
Metropolitan Dade County
73 West Flagler Street
Miami, Florida 33130

Dear Roger:

I have previously expressed to you that the evaluations by the County Communications Evaluation Committee *are being* grossly biased against Southern Bell by Tom Pomeroy. I have personally reviewed the details of some of these evaluations and formed this opinion.

I was shocked today to find an additional impact his evaluations are having on Southern Bell. The attached *County* evaluation sheet was attached to a proposal on a competitive case with one of our business customers.

Roger, I don't believe that you condone this practice of allowing Southern Bell management to be put in embarassing situations as a result of apparent unobjectivity on the part of staff.

Joel

Attachment

cc: Mr. Merrett Stierheim
Mr. Bill Talbert
Mr. J. M. Brown

**PROPOSAL EVALUATION**

**PUBLIC DEFENDERS TELEPHONE SYSTEM**
**NUMERICAL RATINGS**

| | |
|---|---|
| SOUTHERN BELL BASIC BID— | 96 |
| SOUTHERN BELL ALTERNATE BID— | 99 |
| FLORIDA TELCOM, INC. BID— | 121 |
| GENERAL DYNAMICS BID— | 106 |
| FLORIDA COMMUNICATIONS CONSULTANTS, INC. BASIC BID— | 164 |
| FLORIDA COMMUNICATIONS CONSULTANTS, INC. ALTERNATE BID— | 102 |

**EVALUATION COMMITTEE RECOMMENDS—FLORIDA COMMUNICATIONS CONSULTANTS, INC.—BASIC BID**

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

**CASE No. 80-4999 (CA-02)**

THOMAS P. POMEROY,

*Plaintiff,*

v.

SOUTHERN BELL TELEPHONE
AND TELEGRAPH COMPANY

*Defendant.*

**ORDER DISMISSING COMPLAINT WITH PREJUDICE**

THIS CAUSE came on to be considered by the Court, after due notice, upon Defendants' Motion to Dismiss with Prejudice and the Court having reviewed the record herein, including the Complaint and Exhibits and the Memoranda of Law, having heard argument of counsel, it is accordingly,

ORDERED AND ADJUDGED as follows:

1. Defendants' Motion to Dismiss with Prejudice is hereby granted.

2. The Complaint herein be and the same is hereby dismissed with prejudice.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida this 31 day of July, 1980.

RECORDED
AUG 5 1980
RICHARD P. BRINKER
Clerk

/s/ Circuit Court Judge

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1982

**CASE NO. 80-1809**

THOMAS P. POMEROY,

*Appellant,*

v.

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, a foreign corporation, and JOEL D. WARE,

*Appellees.*

Opinion filed March 9, 1982.

An Appeal from the Circuit Court for Dade County, Edward H. Swanko, Judge

Bailey & Dawes and Jessie C. Jones, for appellant.

Shutts & Bowen and Phillip G. Newcomm and William J. Gallwey, III and Sally M. Richardson, for appellees.

Before SCHWARTZ and PEARSON, DANIEL and JORGENSON, JJ.

SCHWARTZ, Judge.

Stung by successive recommendations by a Dade County evaluation team headed by Thomas Pomeroy against the company's bids on various projects, Joel Ware, a Southern Bell vice-president, wrote to Pomeroy's superior—with copies to the county manager and another county official—which, in essence, complained that he had "grossly biased" the evalua-

tions against Southern Bell.[1] The trial court dismissed Pomeroy's complaint against Ware and Southern Bell, based on the letter, with prejudice. In our view, the allegedly defamatory statements sued upon were no more than expressions of opinion and were therefore properly determined to be nonactionable as a matter of law. From v. Tallahassee Democrat, Inc., 400 So.2d 52 (Fla. 1st DCA 1981); Palm Beach Newspapers, Inc. v. Early, 334 So.2d 50 (Fla. 4th DCA 1976), appeal dismissed, cert. denied, 354 So.2d 351 (Fla. 1977), cert. denied, 439 U.S. 910 (1978).

Affirmed.

---

[1] In its entirety, the letter stated:

Dear Roger:

I have previously expressed to you that the evaluations by the County Communications Evaluation Committee *are being* grossly biased against Southern Bell by Tom Pomeroy. I have personally reviewed the details of some of these evaluations and formed this opinion.

I was shocked today to find an additional impact his evaluations are having on Southern Bell. The attached *County* evaluation sheet was attached to a proposal on a competitive case with one of our business customers.

Roger, I don't believe that you condone this practice of allowing Southern Bell management to be put in embarassing situations as a result of apparent unobjectivity on the part of staff.

**Supreme Court of Florida**

**CASE NO. 61,954**

**District Court Of Appeal, 3d District - No. 80-1809**

THOMAS P. POMEROY,

*Petitioner,*

v.

SOUTHERN BELL TELEPHONE & TELEGRAPH CO., *et al.*,

*Respondents.*

Friday, July 16, 1982.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ALDERMAN, C.J., BOYD, OVERTON and McDONALD, JJ., concur ADKINS, J., dissents

A True Copy
TEST:
Sid J. White
Clerk Supreme Court
by: Tanya Carroll
Deputy Clerk

TC
cc: Hon. Louis J. Spallone, Clerk
Hon. Edward H. Swanko, Judge
Hon. Richard P. Brinker, Clerk

Jesse C. Jones, Esquire
Mercedes C. Busto, Esquire
Phillip G. Newcomm, Esquire
William J. Gallwey, III, Esquire
Sally M. Richardson, Esquire

FILED
NOV 19 1982
CLERK

CASE NO. 82-656

in the

# Supreme Court

of the

# United States

October Term, 1982

THOMAS P. POMEROY,

*Petitioner,*

*vs.*

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY AND JOEL D. WARE,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

**Whether the Ware Letter sued on herein contains mere statements of opinion, based on disclosed or known nondefamatory facts, and is therefore immune from liability.**

## LIST OF PARENT, SUBSIDIARY, AND AFFILIATED COMPANIES

Respondent Southern Bell Telephone and Telegraph Company is a subsidiary of American Telephone and Telegraph Company.

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## OPINION BELOW

The opinion below is reported: *Pomeroy v. Southern Bell Telephone and Telegraph Company*, 410 So.2d 647 (Fla. App. 1982), *petition for review denied*, 418 So.2d 1280 (Fla. 1982).

## JURISDICTION

This Court does not have certiorari jurisdiction because the decision sought to be reviewed is based upon a nonfederal ground, *viz.* that the statements complained of are merely expressions of opinion and therefore immune from liability.

## CONSTITUTIONAL PROVISIONS INVOLVED

Respondents contend that the decision below was based on state law and therefore does not involve any constitutional provision.

## STATEMENT OF THE CASE

Petitioner's complaint attempted to allege libel and slander[1] grounded upon a letter ("Ware Letter") written by Joel Ware, vice-president of Southern Bell, to Roger Carlton, Executive Assistant to the Dade County Manager, complaining about the County bid evaluations performed by Thomas Pomeroy as Supervisor of the Telecommunications Division of Metropolitan Dade County. More specifically, Mr. Ware opines in his

[1]Although other claims were raised in his complaint, petitioner herein complains only of the dismissal of the libel and slander counts.

letter that the County bid evaluations "are being grossly biased against Southern Bell by Tom Pomeroy," and further states "I have personally reviewed the details of some of these evaluations and formed this opinion."

In their motion to dismiss the complaint, respondents raised the First Amendment right to petition the government for redress of grievances and the applicability of the *New York Times* standard of actual malice. Both the trial court and the Third District Court of Appeal, however, decided that the Ware letter contained only statements of opinion and thus was not actionable.

The complaint was dismissed by the trial court. The Third District Court of Appeal affirmed, holding that:

> the allegedly defamatory statements sued upon were no more than expressions of opinion and were therefore properly determined to be non-actionable as a matter of law.

The Florida Supreme Court declined jurisdiction to review the decision of the Third District Court of Appeal.

## SUMMARY OF ARGUMENT

The only question involved in this case is whether the Ware Letter is an expression of pure opinion and therefore immune from liability under state law. The Florida courts have not misconstrued this Court's First Amendment decisions to create a blanket immunity for statements of opinion implying undisclosed defamatory facts, and that issue is not presented in this case.

Furthermore, even if the immunity afforded pure statements of opinion is deemed to be a federal question, this Court should not accept jurisdiction because the decision below does not conflict with any decisions of this Court nor present any undecided question of public importance.

## ARGUMENT

### I. THE DECISION IS BASED UPON STATE LAW.

Although substantial federal questions were raised below by respondents in their motion to dismiss the complaint, including the First Amendment right to petition the government of redress of grievances and the applicability and extent of the protection afforded statements about public officials in *New York Times v. Sullivan*, 376 U.S. 254 (1964), this case was decided on the independent nonfederal ground that the statements complained of are merely opinions and are therefore immune from liability.

The interpretation of allegedly defamatory statements, and the immunity afforded expressions of opinion, is a question of state law so long as that law does not impinge upon First Amendment considerations. Petitioner's contention is not that any First Amendment protections have been violated, but rather that the Florida courts have misconstrued the First Amendment and the *dicta* of this court in *New York Times*, *supra* and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) to afford *too much* protection to allegedly defamatory statements. But while *New York Times* and *Gertz* may provide the more eloquent and authoritative statement of the proposition that statements of pure opinion are

immune from liability, and have frequently been cited for that proposition, this immunity was recognized by the Florida Supreme Court, without resort to any federal authority, as early as 1956. In *White v. Fletcher*, 90 So.2d 129, 131 (Fla. 1956), the Florida Supreme Court noted, albeit in dicta,

> It appears from the record that in the first instance Fletcher's comment might well constitute merely an "opinion or inference from facts assumed to be true" and be, therefore, immune from liability for defamation. 53 C.J.S., Libel and Slander, §131(3).

Because the decision herein found the Ware Letter to be no more than an expression of opinion and therefore nonactionable as a matter of law, there is no constitutional question to be reviewed.

## II. CERTIORARI SHOULD BE DENIED.

Moreover, even if the First Amendment immunity afforded expressions of opinion is deemed by this Court to be involved in this decision, certiorari should be denied because the decision is manifestly correct and because this case does not present an appropriate vehicle for correction of any perceived misconstruction of this Court's decisions in *New York Times* and *Gertz*.

First, petitioner's statement of the question presented is wholly extraneous to the record herein. The Florida courts have not held, and did not hold in this case, that "an opinion which implies the allegation of undisclosed defamatory facts as its basis [is] absolutely

privileged." Rather, the Third District Court of Appeal held that the Ware Letter contained "no more than expressions of opinion." 410 So.2d at 648.

By misconstruing the decision herein as creating a blanket immunity for expressions of opinion, petitioner attempts to create a federal question. A review of the full text of the statements complained of, as set forth in the opinion of the Third District, reveals the correctness of that court's holding. This case does not concern the immunity afforded expressions of opinion which are based on undisclosed defamatory facts. As is obvious from the Ware Letter, the only "facts" underlying the opinion contained therein are the County bid evaluations prepared by petitioner, which are incapable of being defamatory of petitioner. Petitioner's attempt to rewrite the Ware Letter to imply undisclosed defamatory facts has been rejected by three Florida courts. That attempt must fail here as well, not only because the implication is groundless, but because the issue, affecting as it does *only* Pomeroy and Ware, is of insufficient public importance to warrant certiorari review.

This Court's decisions in both *Gertz, supra* and *New York Times, supra*, have indicated by *dicta* that expressions of pure opinion are protected by the First Amendment. Any backtracking by the Court at this point would throw the issue into unnecessary chaos and, respondents submit, spawn serious impediments to the free exchange of ideas. This Court's dicta has been properly relied upon by both federal and state courts throughout the United States, albeit frequently with coexistent state law support, to deny relief for statements which are nothing more than opinions and do not imply the existence of undisclosed defamatory facts.

Petitioner has pointed to no case involving the "simplistic fact/opinion dichotomy" which he so strenuously asserts must be corrected by this Court now. Indeed, one of the cases relied upon by the court below, *From v. Tallahassee Democrat, Inc.*, 400 So.2d 52 (Fla. App. 1981), *pet. for review denied*, 412 So.2d 465 (Fla. 1982), took great care to set forth the precise rule of law which petitioner erroneously contends has been ignored by the Florida courts.

> *Gertz* would indicate that expressions of opinion are privileged and protected by the Constitution. There is, however, a distinction between pure expression of opinion and mixed expression of opinion. *Pure opinion occurs when the defendant makes a comment or opinion based on facts* which are set forth in the article or *which are otherwise known or available to the reader or listener* as a member of the public. Mixed expression of opinion occurs when an opinion or comment is made which is based upon facts regarding the plaintiff or his conduct that have not been stated in the article or assumed to exist by the parties to the communication. Restatement (Second) of Torts, §566, pp. 171-172.

400 So.2d at 57. (emphasis added). This is a correct statement of the law of Florida as it existed before the *Gertz* opinion, and since then. This same distinction applied to the facts of this case reveals that only pure opinion is involved herein and the decision sought to be reviewed is eminently correct. Should this Court perceive any error in the rule of law stated in *From* and applied herein, its correction ought to abide a record, unlike ours, in which the allegedly defamatory statements *do*

imply the existence of undisclosed defamatory facts which are not known to the audience.

Finally, it should be observed that were this Court to grant certiorari, any opinion contrary to the decision of the Florida court herein will require a consideration of the constitutional questions eschewed below, *viz.* 1) the immunity afforded legitimate petitions to the government for redress of grievances suffered at the hands of a public employee in the performance of his official duties, and 2) whether or not petitioner is a public official to whom the *New York Times* standard is applicable, and if so, whether or not a different standard for evaluating the immunity afforded the statements is applicable.[2] Thus, even if a dispositive opinion on the extent of constitutional immunity afforded to statements of opinion is deemed advisable, it should not be rendered in this case because to do so will necessarily raise other constitutional issues before they are fully developed.

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[2]In obeisance to this Court's mandate of brevity, respondents have not addressed the merits of these issues, but would request permission to do so in the event that certiorari is granted.

## CONCLUSION

For the foregoing reasons, respondents respectfully submit that certiorari should be denied.

Respectfully submitted,

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